

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
UNIVERSITY MEDICAL IMAGING, P.C.	:	DETERMINATION
	:	DTA NO. 816312
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period August 1, 1993 through April 30, 1996.	:	

Petitioner, University Medical Imaging, P.C., c/o William R. Nojay, Esq., 800 First Federal Plaza, Rochester, New York 14614, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period August 1, 1993 through April 30, 1996.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 7, 1998 at 10:00 A.M. with all briefs to be submitted by January 13, 1999. Neither party submitted a brief. Accordingly, the six-month period for the issuance of this determination began on January 13, 1999. Petitioner appeared by William R. Nojay, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Brian J. McCann, Esq., of counsel).

ISSUE

Whether petitioner's purchase and lease of diagnostic imaging equipment was exempt from sales tax pursuant to Tax Law § 1115(a)(12) because such equipment was used in the production of tangible personal property for sale.

FINDINGS OF FACT

1. Petitioner, University Medical Imaging, P.C., filed an application for refund of sales and use taxes dated August 20, 1996 seeking a refund of \$150,645.01 in sales tax paid on the purchase and lease of medical equipment during the period August 1, 1993 through April 30, 1996. Such equipment included diagnostic imaging equipment for general x-ray, magnetic resonance imaging (MRI), Computerized Axial Tomography (CAT Scan), ultrasound and mammography. The refund claim also included tax on payments made under service and maintenance contracts for the equipment. Petitioner's refund claim asserted that the equipment was exempt as medical equipment pursuant to 20 NYCRR 528.4(e)(2).

2. By letter dated January 15, 1997, the Division of Taxation ("Division") denied petitioner's claim in full.

3. Petitioner is a professional service corporation organized in 1989 under Article 15 of the Business Corporation Law. Petitioner's Certificate of Incorporation states:

The purposes for which the Corporation [petitioner] is formed are to engage as a professional service corporation in the practice of medicine as authorized by Article 15 of the Business Corporation Law and to render those professional services to the public which a duly licensed physician may render under the laws of the State of New York.

4. Petitioner was organized by radiologists employed as full-time faculty members of the Department of Radiology of the University of Rochester School of Medicine and Dentistry ("the Department"). Petitioner's by-laws state that its shareholders must be licensed to practice medicine and must be "full-time members of the Department of Radiology of the University of Rochester School of Medicine and Dentistry and provide clinical services therein." Petitioner currently has about 25 shareholders, all of whom are qualified under these by-law provisions.

5. Petitioner's by-laws also provide that its directors and officers must be shareholders and licensed to practice medicine. The by-laws also state that petitioner's president must be the Chair or Acting Chair of the Department.

6. Petitioner's by-laws designate the president as petitioner's chief executive officer and charge the individual holding that office with "the general management of the affairs of [petitioner]."

7. Petitioner, the University of Rochester Medical School and the Department have an agreement whereby the University authorizes and assigns faculty members of the Department to work at the site of petitioner's operation. The radiologists so assigned are members of the Department and are petitioner's shareholders. The radiologists are members of a partnership called Radiologists of the University of Rochester and are, as noted, full-time employees of the University. The radiologists are not employees of petitioner. University of Rochester radiologists are present at petitioner's facility Monday through Friday from approximately 8:00 A.M. until 5:00 P.M.

8. Petitioner and the University have also agreed to share in petitioner's profits.

9. Petitioner's facility is located in a freestanding building in a suburb of Rochester, New York. Petitioner has its own entrance to the building. Petitioner's facility has a reception area, separate rooms for each of the different types of imaging equipment used by petitioner, and a work area for the University of Rochester radiologists, which includes an office and a reading area where the medical images produced by petitioner are illuminated and are read and interpreted by the radiologists.

10. Petitioner produces medical images on acetate film using the following equipment and technologies:

a.) **General radiography**, commonly called an x-ray, uses ionizing radiation to produce images of bony structures inside the body. The technician, called a radiologic technologist, directs the patient to lie on a table or, in the case of a chest x-ray, to stand against a wall stand. The technician uses special equipment and exposes the radiographic film to the desired body part. The exposed film is then developed into an image by the technologist using various chemicals.

b.) **Ultrasound** uses sound waves to produce images. A technician, called an ultrasonographer, covers the appropriate area of the patient's body with a gel and then proceeds to scan the area by placing a hand-held instrument, called a transducer, against the patient's skin, slowly passing over the area of interest. The transducer produces high frequency sound waves which strike various organs and tissues and echo back to the transducer. Different tissues and organs produce different echoes. A computer transforms these different echoes, or frequencies, into an image which is then printed on x-ray film.

c.) **CAT (Computerized Axial Tomography)** also uses x-rays to produce images. With the CAT scan, however, the patient, lying on a table, moves through a device which has an x-ray tube in it. The technician views the image on a computer monitor and programs the slice thickness, the dose of radiation required, and the specific area of interest. The table then moves in the prescribed increments. At each such "slice" the x-ray tube focuses a narrow beam of x-rays across the prescribed section while rotating around the patient's body. By rotating the tube, the technician can acquire multiple images at different angles creating a cross-sectional image. The computer converts the images so obtained for printing on x-ray film.

d.) **MRI (Magnetic Resonance Imaging)** uses a large magnet, radio waves, and a computer to produce detailed images of the body. The patient is placed on a table and the

technician programs a scanner to perform several different types of scans, checking each scan before proceeding to the next. The technician will film each of the images, off the monitor, using a laser camera. When a sheet of film is full (20 images), the film is sent to the processor. The processor will run the film through various tanks of chemicals in order to develop it. It is not uncommon to have over 100 images of a particular area.

11. Approximately 60 percent of petitioner's medical images are x-rays, approximately 10 percent are ultrasound images, and the remaining 30 percent are equally divided between CAT Scan and MRI images.

12. As noted, all of the medical images produced by petitioner are on acetate film. Petitioner owns or leases all of the equipment used in the production of the images. Petitioner also purchases, prior to its use, all chemicals and film used in the production of the images. Petitioner pays sales tax on its purchases of such supplies.

13. Until 1994 petitioner also produced images using mammography equipment. Payments on petitioner's mammography equipment were made during the period at issue and are part of petitioner's refund claim. Documents submitted by petitioner in support of its claim indicate that \$4,415.40 of petitioner's refund claim arises from purchases of mammography equipment. Petitioner offered no testimony of the manner in which images are produced using this equipment.

14. Patients are referred to petitioner by their physician or other designated medical provider. Under New York law, with the exception of mammography, only persons licensed to provide medical or similar services may order medical imaging. As noted above, petitioner no longer produces images using mammography equipment. Accordingly, petitioner does not produce any medical images unless requested by a properly licensed medical provider.

15. The process by which petitioner produces medical images begins with the order, similar to a prescription, placed with petitioner by the patient's medical provider. Such an order will specify the body part that the provider wants imaged. If the requesting medical provider has a question regarding the best way to get an image of a particular body part or complications in a particular case, the provider may consult one of the University of Rochester radiologists. In such a case, the requesting medical provider and the radiologist will reach an agreement as to the most acceptable protocol, or series of images, to achieve the desired result. The radiologist would then write the agreed-upon protocol on the order for the patient. The order is given to the technician at the time of the imaging procedure who will follow it as written. In contrast, if the request is for a standard image, such as a chest x-ray, and the patient presents no complications, there may be no discussion between the requester and the radiologist. In such a case, the requesting physician would place the order, the patient would arrive at the facility, and the technician would get the image in accordance with a standard protocol. Standard protocols are suggested by the manufacturer of the imaging equipment. All protocols are subject to change by the radiologist or requesting medical provider and commonly are changed to suit the needs of a particular patient. Ultimately, the requesting physician, in consultation with the University of Rochester radiologist is responsible for selecting the protocol. Petitioner's technicians do not determine the protocol.

16. Upon arrival at petitioner's facility for an imaging procedure, the patient provides an employee of petitioner with basic registration and insurance information. The patient will then fill out a "check sheet" by which petitioner obtains a medical history of the patient. A technician then reviews the patient's completed check sheet and explains the procedure to the patient. If the patient's answers raise any questions for the technician, he or she will consult with a University of Rochester radiologist. In such a case, the radiologist, possibly in consultation with the

patient's primary care physician, will determine whether the procedure will continue. For certain imaging procedures, the patient must be injected with a dye prior to the procedure. For a small percentage of procedures the patient is injected with dye after an initial imaging procedure has been completed. In those cases, further images are taken after the injection. All such injections are performed by the University of Rochester radiologists who are present at petitioner's facility. The physician and not petitioner is compensated for performing the injection. Any claims of malpractice in connection with the injections would trigger the physician's malpractice policy. Petitioner does not carry medical malpractice insurance.

17. Once the patient has been prepared, the technician performs the specific imaging procedure as ordered by the requesting medical provider. The technician follows the protocol set by the requester and the radiologist. The technician does not use any discretion in determining the protocol to be used.

18. There is no radiologist or other licensed medical provider present in the room at the time the technician operates the imaging equipment. During that time, the technician is responsible to observe and report the patient's condition and to report any unusual occurrences.

19. After the imaging procedure has been completed, the technician does a quality control check of the film that has been created. The film is then delivered to the University of Rochester radiologist present at petitioner's facility who interprets the image and provides diagnostic services. Petitioner's technicians may not presume that the medical image is appropriate and the procedure completed until the radiologist reviews the image. The technicians do not interpret the images and do not discuss diagnosis or treatment with the patient.

20. Petitioner also typically delivers a copy of the image to the requesting medical provider.

21. As part of his or her diagnostic services, the radiologist writes a report summarizing his or her findings and transmits this report to the requesting medical provider.

22. Petitioner has about 15 employees. About nine of petitioner's employees are technicians and six perform clerical duties. The technicians operate petitioner's medical imaging equipment. All of petitioner's technicians have been trained in the operation of the equipment. The technicians that operate petitioner's x-ray and CAT scan equipment are licensed by New York State in the operation of such equipment. Petitioner's employees are supervised by an office manager. The office manager is an experienced technician in all modalities and is charged with the day-to-day supervision of petitioner's employees and the operation of the equipment. None of petitioner's employees are licensed to practice medicine and none of petitioner's employees do practice medicine as that term is defined in section 6521 of the Education Law.

23. At the time of petitioner's organization, petitioner's status as a professional service corporation was reviewed by the State Departments of Health, Education and Insurance, as well as the State Attorney General's Office. At that time, petitioner's representatives fully disclosed the nature of petitioner's business activities and the fact that petitioner would not be employing any persons licensed to practice medicine. None of these state agencies objected to petitioner's use of the professional corporation form of business.

24. Petitioner's technicians do not provide any diagnosis or interpret medical images in any manner. No radiologist or other person licensed to provide medical services directly oversees petitioner's technicians in the operation of the imaging equipment.

25. Radiologists of the University of Rochester do not order imaging procedures from petitioner.

26. There is no contract between petitioner and the Radiologists of the University of Rochester for the radiologists to provide diagnostic services to petitioner's patients.

27. Petitioner bills its patients directly or through their insurance company. Petitioner bills on a per procedure basis, regardless of the number of scans performed. Petitioner does not charge sales tax for its procedures. Petitioner bills a single fee for both the medical imaging and the diagnostic services provided by the Radiologists of the University of Rochester. The Radiologists of the University of Rochester have assigned their payment for services to petitioner. According to petitioner such a "global bill" is required because State Insurance Department regulations and Medicare and Medicaid requirements allow freestanding imaging centers such as petitioner to submit only one bill for service. Upon receipt of payment from the patient or his or her insurance company petitioner distributes the portion of the bill attributable to the radiologist's services back to the radiology group. Petitioner does not retain any portion of the radiologists' diagnostic fee and the radiologists do not share in petitioner's fee. The apportionment of the "global fee" charged by petitioner is made in accordance with insurance company fee schedules for such services.

28. Petitioner is required by law to retain copies of the medical images it produces for a period of several years. Petitioner has approximately 100,000 images in its files. Control of the medical images resides with the patient and his or her medical provider. Petitioner may not copy, transfer, sell or dispose of the medical images in its files without the authorization of the patient. Even after the mandatory storage period has expired, petitioner must obtain the consent of the patient in order to dispose of the image. There is no value in such images for petitioner. Petitioner does not include its archive of medical images on its financial statements either as an asset or a liability.

SUMMARY OF THE PARTIES' POSITIONS

29. Petitioner contends that it is engaged in the production of tangible personal property, i.e., medical images on acetate film, for sale. Accordingly, petitioner asserts that its purchases of machinery and equipment used to produce such tangible personal property are exempt from tax pursuant to Tax Law § 1115(a)(12). The Division asserts that petitioner does not use its medical imaging equipment to produce tangible personal property for sale. The Division contends that petitioner purchased the equipment for use in performing a medical service and that such purchases were therefore properly subject to tax.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a tax on the retail sale of tangible personal property. All sales of tangible personal property are presumptively subject to tax pursuant to Tax Law § 1132(c). Tax Law § 1115(a)(12) exempts from the tax imposed under section 1105(a) sales of “[m]achinery or equipment for use or consumption directly and predominantly in the production of tangible personal property . . . *for sale*” (emphasis added). Additionally, Tax Law § 1105-B(b) exempts from the statewide sales tax the receipts from every sale of the services of installing, repairing, maintaining or servicing tangible personal property described in Tax Law § 1115(a)(12) from the tax imposed under Tax Law § 1105(a), but not from the taxes imposed by localities under Tax Law §§ 1107 or 1108 or authorized under Tax Law Article 29.

B. The Commissioner’s regulations provide that tangible personal property purchased for use in performing a service not subject to tax is not purchased for resale and is therefore taxable (*see*, 20 NYCRR 526.6[c][7]). Tax Law § 1105(c) imposes sales tax on certain services enumerated therein. Medical or similar services are not among the services so listed and are therefore excluded from sales tax. Consistently, the law and regulations further provide that

“[m]edical equipment and supplies purchased for use in performing medical or similar services for compensation are not exempt from tax” (20 NYCRR 528.4[h][1]; *see also*, Tax Law § 1115[a][3]).

The regulations define “medical services” as follows:

Medical services for human beings include but are not limited to the practices of medicine, dentistry, physical therapy, chiropractic, nursing, podiatry, optometry and radiology, whether performed by a private practitioner, clinical laboratory, hospital, nursing home, ambulance service, clinic, or health maintenance facilities. (20 NYCRR 528.4[h][2].)

The regulations define medical equipment as follows:

(1) Medical equipment means machinery, apparatus and other devices . . . which are intended for use in the cure, mitigation, treatment or prevention of illnesses or diseases or the correction or alleviation of physical incapacity in human beings.

(2) To qualify, such equipment must be primarily and customarily used for medical purposes and not be generally useful in the absence of illness, injury or physical incapacity. (20 NYCRR 528.4[e].)

C. Petitioner is seeking an exemption from sales tax. Exemptions from tax are to be strictly construed. “An exemption from taxation ‘must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption’ ” (*Matter of Grace v. State Tax Commn.*, 37 NY2d 193, 196, 371 NYS2d 715, 718, *lv denied* 37 NY2d 708, 375 NYS2d 1027 quoting *People ex rel. Savings Bank of New London v. Coleman*, 135 NY 231, 234).

D. Petitioner has failed to establish entitlement to the production exemption set forth in Tax Law § 1115(a)(12). “[I]n order for machinery and equipment to qualify for the [production] exemption, the taxpayer must produce tangible personal property for sale as a separate product” (*Matter of Delta Sonic Car Wash Systems*, Tax Appeals Tribunal, November 14, 1991).

Petitioner did not sell the medical images it produced as a separate product. Rather, petitioner produced medical images for use in the performance of medical services. All medical images produced by petitioner were used by University of Rochester radiologists to perform diagnostic services. The medical image produced by petitioner *and* the radiologist's report were transferred to the requesting medical provider. Additionally, petitioner billed its patients a single charge for the imaging and diagnostic components of this service. A taxpayer's billing methods can provide substantial evidence of the true nature of its business (*see, Atlas Linen Supply Co., v. Chu*, 149 AD2d 824, 540 NYS2d 347, 348). Here, petitioner's billing methods show that petitioner produced medical images as part of the provision of a radiological service and did not separately sell medical images to its patients.

An examination of the imaging procedure also indicates that petitioner produced medical images as part of the provision of a medical service in conjunction with the Radiologists of the University of Rochester. Specifically, the protocol, or series of images to be created by petitioner is set by the requesting medical provider and the University of Rochester radiologist. Petitioner's technician obtains a medical history from the patient prior to the imaging procedure. If the information provided by the patient raises any questions for the technician, he or she takes such questions to a University of Rochester radiologist to determine whether the procedure should continue. In many cases the imaging procedure requires the injection of dye into the patient. Such injections are performed by University of Rochester radiologists. Petitioner's technicians are required to observe their patients during the imaging procedure and to report any unusual occurrences. The imaging procedure is not completed until the radiologist reviews the image. The imaging procedure thus involves much more than simply the operation of the imaging equipment and the production of a medical image. As these parts of the overall procedure make

clear, the imaging procedure is part of the provision of a medical service. Petitioner's purchase of the equipment in question was therefore properly subject to tax.

E. It may be argued that the instant matter is distinguishable from *Matter of Delta Sonic Car Wash Systems, supra*, and the cases cited therein (*see, Matter of Midland Asphalt Corp. v. Chu*, 136 AD2d 851, 523 NYS2d 697, *lv denied* 72 NY2d 806, 532 NYS2d 847; *Matter of Southern Tier Iron Works v. Tully*, 66 AD2d 921, 410 NYS2d 711, *lv denied* 46 NY2d 713, 416 NYS2d 1027; *Matter of Spancrete Northeast*, Tax Appeals Tribunal, March 8, 1990). In those cases, the same entity produced tangible personal property and contracted to provide services. Here, petitioner produces tangible personal property, while the University of Rochester radiologists provide diagnostic services. This factual distinction does not warrant a different result. Although petitioner and the Radiologists of the University of Rochester are separate entities and there is no contract between the two for the radiologists to provide diagnostic services to petitioner's patients, as discussed previously, these two entities provide a medical service. Indeed, while there may be no contract between the two, the radiologists provide diagnostic services to all of petitioner's patients and petitioner bills its patients a single charge for the imaging and diagnostic components of the service. Certainly, there is no evidence in the record to suggest that petitioner's patients seek to acquire a medical image as such. Indeed, as noted previously, petitioner may produce a medical image only upon the order of a licensed medical professional. Clearly, petitioner's patients are purchasing a medical service, of which the production of the medical image is but a part. To carve out a portion of this service and to label that portion as the sale of film, as petitioner apparently seeks to do, is not reflective of the true nature of petitioner's business.

F. Petitioner's position appears to weigh heavily on the fact that none of its employees are licensed to practice medicine within the meaning of Education Law § 6521. The regulations do not restrict the use of medical equipment to persons licensed to practice medicine in order to qualify for exemption. 20 NYCRR 528.4(h)(1) refers to "medical *or similar* services" (emphasis added) and the definition of "medical services" in 20 NYCRR 528.4(h)(2) (*see*, Conclusion of Law "B") is broader than the definition of the "practice of medicine" in Education Law § 6521.¹ Moreover, example 2 in section 528.4(h)(1) of the regulations states that medical equipment purchased by an ambulance service is not exempt from sales tax. Certified ambulance services are not required to employ persons licensed to practice medicine (*see*, 10 NYCRR 800.21), yet the ambulance service provides a medical service for purposes of the sales tax regulations. Accordingly, the fact that petitioner does not employ any physicians is not dispositive.

G. Petitioner also appears to assert that its billing practices were necessitated by government regulations. Petitioner did not cite such regulations, however, and absent an analysis of the regulations in question, it is impossible to discern their meaning or intent. As noted previously, this determination finds that petitioner's billing practices provide evidence that petitioner does not separately sell medical images, but provides such images as part of the provision of a medical service. It may be argued, however, that any such regulation requiring "global" billing merely reflects the reality that imaging centers, such as petitioner, provide images as part of the provision of a medical service. Such a regulation would thus support the conclusion reached herein.

¹ Education Law § 6521 defines the "practice of the profession of medicine" as "diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition."

H. Petitioner introduced no evidence regarding the use of its mammography equipment which formed a small portion of the refund claim. This portion of the refund claim is denied accordingly.

I. The petition of University Medical Imaging, P.C. is denied, and the Division of Taxation's denial of petitioner's refund claim dated January 15, 1997 is sustained.

DATED: Troy, New York
July 8, 1999

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE